University of Arkansas at Little Rock Law Review

Volume 3 | Issue 1 Article 7

1980

Family Law–Child Custody–Counsel for Children Permitted

Deborah R. Sallings

FAMILY LAW—CHILD CUSTODY—COUNSEL FOR CHILDREN PERMITTED. *Ricketts v. Ricketts*, 265 Ark. 28, 576 S.W.2d 932 (1979).

Eugene and Alberta Ricketts had voluntarily placed their four children, who ranged in age from eleven to seven, in foster care on several occasions because of marital problems. The mother eventually abandoned the family, and the father received custody of the cildren following his divorce in 1975.

In April 1976 Arkansas Social Services filed an emergency petition in the juvenile court of Carroll County for custody of the children because of the father's incarceration.[1] The proceedings were recessed by the juvenile court until the father could receive treatment for alcoholism, and the children were again placed in foster care. In August 1976 Arkansas Social Services filed a petition to have the children declared dependent and neglected and sought permanent custody, alleging that the father had refused to obtain the ordered alcohol treatment and was unable to provide a suitable home for the children.

The petition was granted, and the father appealed to the circuit court of Carroll County.[2] Both the father and social workers from Arkansas Social Services appeared at the hearing and were represented by counsel. However, the parties agreed that it was not in the children's best interests to be present, nor were they represented by counsel. On March 1, 1978, the circuit court reversed the juvenile court and ordered that the children be returned to their father. The children then obtained counsel and moved to vacate the circuit court order on the grounds that their interests had not been represented. At the time the motion was filed, the children also filed affidavits in which they expressed fear of their father and detailed instances occurring while they were in their father's custody of physical abuse, neglect, drunkenness, and other improper conduct by their father and his friends. The motion was denied by the circuit court, and from that decision the children appealed to the Arkansas Supreme Court. The denial of the motion was reversed on appeal, and the case was remanded to the circuit court. *Ricketts v. Ricketts*, 265 Ark. 28, 576 S.W.2d 932 (1979).

---

1. ARK. STAT. ANN. §§ 45-401 to -449 (1977 & Cum. Supp. 1979) comprise the Juvenile Code. § 45-423 allows for the filing of a dependency-neglect petition by any adult having knowledge of the circumstances of the child. Section 45-402 empowers the juvenile court to declare a child dependent and neglected and to place that child in a home the court deems, suitable.

2. ARK. STAT. ANN. § 45-440 (1977) provides that appeals from juvenile court are to be taken to the circuit court in the county in which the case was decided and heard de novo.

The attitude of courts toward the status of children involved in custody proceedings has undergone distinct changes since early English history. One early concept that had significant influence on the law was derived from the Roman doctrine of *patria potestas.*[3] Central to this doctrine was the idea that the father had absolute power over the persons of his children and an absolute right to their custody and control;[4] the mother being entitled merely to "reverence and respect."[5] Early in English history, however, this attitude was tempered somewhat by recognition of some rights possessed by children.[6] According to English law as recorded by Blackstone, children had various privileges and disabilities. For example, they could not be sued unless joined with their guardians, but they could sue, either through their guardians or through their *prochein amy* or next friend.[7] Also, legislation passed in England in the mid-nineteenth century further diluted the strict adherence to *patria potestas.*[8]

Another important concept that developed in English law was the doctrine known as *parens patriae.*[9] This concept developed from early feudal concerns about protection of land and persons' interests in that land. Guardianship laws were designed primarily to protect children of the landed classes so that title to the land and its accouterments would pass smoothly.[10] As in all societies, however, there were unfortunate children who had no interest in land and no one to look out for them. It became the duty of the ecclesiastical courts to provide protection for those children who were not heirs.[11] The

---

3. 2 F. POLLOCK & F. MATILAND, THE HISTORY OF ENGLISH LAW 437 (2d ed. 1898).

4. U.S. BUREAU OF EDUC., *Legal Rights of Children,* U.S. BUREAU OF EDUC. CIRCULARS OF INFORMATION, No. 3 (Washington D.C. 1880), *reprinted in* S. KATZ, THE LEGAL RIGHTS OF CHILDREN 24 (1974).

5. 1 W. BLACKSTONE, COMMENTARIES 441 (Dawsons Reprint 1966).

6. "If our English law at any time knew an enduring *patria potestas* which could be likened to the Roman, that time had passed away long before the days of Bracton." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 438 (2d ed. 1898).

7. 1 W. BLACKSTONE, COMMENTARIES 452 (Dawsons Reprint 1966).

8. The Custody of Infants Act, passed in 1839, provided certain circumstances under which a mother might receive custody of her children who were under seven years old. In 1873, the Infants Relief Act provided for the mother to obtain custody of her children until they were sixteen. KELLY, *On Some Changes in the Legal Status of the Child Since Blackstone,* THE INTERNATIONAL REVIEW, VOL. XIII (New York 1882), *reprinted in* S. KATZ, THE LEGAL RIGHTS OF CHILDREN 85 (1974).

9. H. CLARK, DOMESTIC RELATIONS 572 (1st ed. 1968).

10. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 444 (2d ed. 1898).

11. *Id.*

ecclesiastical courts were the King's courts.[12] The King, as head of state, had an interest in his subjects and was said to be the protector of all who had no other protector.[13] This concept, that the state had an interest in and a responsibility for protecting its children, is the doctrine of *parens patriae*.[14] These two doctrines—*patria potestas* and *parens patriae*—found their way to the United States and became significant in early custody decisions here.[15]

A strong *patria potestas* influence can be seen in early placement decisions in the United States; fathers were usually granted custody of their children.[16] By the end of the nineteenth century, courts were accepting more responsibility for making decisions for the protection of the child, adopting a role similar to the *parens patriae* role that began in England. The courts considered it their duty to protect the welfare of the child.[17]

By 1925, this new standard, the protection of the best interests of the child, was having a significant impact upon child custody.[18] The focus had moved away from merely determining which parent had the right to the custody and control of the child and toward a consideration of the needs and interests of the child in determining appropriate placement. It is this "best interest of the child" doctrine that guides American courts today in matters involving children.[19]

The difficulty with the "best interest" standard is in establishing criteria by which courts can determine what are, in each case, the best interests of the affected child. In most cases the competing parties must persuade the court that placement with them would

---

12. Early English law, through influence from Roman law, developed a system of two courts—civil and canon or ecclesiastical. The ecclesiastical courts were presided over by the clergy, and their jurisdiction extended to matters of spiritual dispute. One important area claimed by the church courts was jurisdiction over marriage, divorce, and legitimacy, and hence, matters involving the status of children. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 111-35 (2d ed. 1898).

13. 2 *id.* at 445.

14. H. CLARK, DOMESTIC RELATIONS 572 (1st ed. 1968).

15. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); *Ex parte* Crouse, 4 Whart. 9 (Pa. 1839).

16. Barry v. Mercein, 3 Hill 399 (N.Y. 1842).

17. U.S. BUREAU OF EDUC., *Legal Rights of Children*, U. S. BUREAU OF EDUC. CIRCULAR OF INFORMATION, No. 3 (Washington D.C. 1880), *reprinted in* S. KATZ, LEGAL RIGHTS OF CHILDREN 25 (1974).

18. Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229, 231 (1970).

19. *See, e.g.*, Whitebread v. Kilgore, 193 Kan. 66, 391 P.2d 1019 (1964); Carr v. Hill, 235 Ark. 874, 363 S.W.2d 223 (1963); *In re* Gibbons, 245 N.C. 24, 95 S.E.2d 85 (1956).

be in the child's best interest.[20] Frequently, because of the adversary nature of the proceedings, this type of proof develops into attempts to establish the other party's unfitness, which puts the court in the position of having to decide from basically negative information where to place the child so that his best interests will be met.[21]

In deciding custody cases, courts sometimes consider the preference of the child, but a decision is seldom based entirely on what the child wants.[22] It is generally within the court's discretion to consider the child's wishes, and courts will look at the individual circumstances of each case in reaching a decision.[23]

Another concept that has been applied by courts in determining placement is the "tender years" doctrine.[24] This doctrine is based on a presumption that a child of "tender years" is much more likely to receive appropriate care if he is in the custody of his mother.[25] Today, courts are looking more carefully at all of the circumstances involved and the weight of such a presumption is easier to overcome than it once was.[26]

A recent development in the area of determining the child's best interests has centered around movements toward obtaining legal representation for the child.[27] The argument raised is that by providing counsel for the child, his interests may be brought before the court more adequately than if he were not represented. The child's attorney would be responsible for bringing out all relevant issues that would have an impact on the child's interests, and he

---

20. The usual situation involves the competing interests of the mother and father in a divorce-custody situation. However, frequently the question over custody of the child will be between the parents and the state or even between parents and grandparents. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769 (N.D. Ala. 1976); Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866 (1967); Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

21. *See, e.g.*, Carle v. Carle, 503 P.2d 1050 (Alaska 1972); Painter v. Banister, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

22. *See, e.g.*, Moore v. Smith, 255 Ark. 249, 499 S.W.2d 634 (1973); Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445 (1966); *In re* Snellgrose, 432 Pa. 158, 247 A.2d 596 (1968).

23. In Vilas v. Vilas, 184 Ark. 352, 42 S.W.2d 379 (1931), the court looked at the ages of the children involved, their maturity, and the degree of animosity they had toward their mother, and determined that the children's feelings, however unfounded, were so strong that they would not change. The court reluctantly upheld the decision to give custody to the father. *Id.* at 359, 42 S.W.2d at 381.

24. *See, e.g.*, St. Clair v. St. Clair, 211 Kan. 468, 507 P.2d 206 (1973); Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 121 N.W.2d 216 (1963).

25. Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 1399, 121 N.W.2d 216, 220 (1963).

26. *Id.*

27. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 65 (1973).

would not be in the position of having to represent the interests of more than one party. This situation would free the parents' attorneys to represent their clients fully without sacrificing parental concerns for the child's interests.[28] The argument in favor of independent counsel for children is frequently couched in terms of due process rights.[29]

Questions have arisen regarding the authority of courts to allow such representation and their legal responsibility to require it. The landmark United States Supreme Court case dealing with the question of due process rights for children is *In re Gault*.[30] The decision in *Gault* arose from the juvenile delinquency adjudication of fifteen year old Gerald Francis Gault. Gault did not receive notice of the charges against him nor was he afforded counsel at the hearing. The court specifically found that, although juveniles are not necessarily entitled to every due process right guaranteed to adults, they are entitled to certain fundamental ones, particularly a right to notice and a right to counsel.[31]

A major hurdle for those who advocate extending the due process right to counsel to children involved in child custody cases has been to stretch *Gault* to fit custody proceedings. While *Gault* was a juvenile court proceeding, and therefore civil in nature,[32] it was also a delinquency adjudication that involved criminal charges against the child, and it was this aspect that the Court addressed. The right to custody of Gault was not at issue; rather, the issue was whether children who are charged with delinquency offenses are to be afforded the same due process rights as adults who are charged with criminal offenses. In applying *Gault* to proceedings such as child custody cases, which are entirely civil in nature, it is necessary to resolve the problems created by the essentially criminal nature of *Gault*. There traditionally has been a distinction, for due process purposes, between criminal and civil proceedings, and the main

28. *Id.* at 67.

29. Roe v. Conn, 417 F. Supp. 769, 780 (N.D. Ala. 1976).

30. 387 U.S. 1 (1967). Gault was accused of making obscene phone calls to a neighbor. He was taken into custody and held in a detention home for four days, during which time an *in camera* hearing was held before a juvenile judge. The boy's parents were present, but neither they nor Gault had counsel present. No record was made, and no witnesses were sworn; further, the complainant did not appear. Later, another hearing was held, and Gault admitted making the calls. He was sentenced to the boys' training school "for the period of his minority, unless sooner discharged by due process of law." *Id.* at 7-8.

31. *Id.* at 41.

32. *Id.* at 17.

thrust of arguments for the appointment of counsel has been in criminal cases.[33]

This distinction between the criminal and civil nature of the proceedings, particularly with regard to child custody questions, has been criticized.[34] The focus of this criticism has been on the nature of the rights involved in a child custody adjudication. It is argued that the issues in a custody proceeding and those in a delinquency proceeding are equally vital, and for this reason at least some fundamental rights should be extended to children in custody cases.[35] The argument is that the nature of the issues rather than the nature of the proceeding should guide courts in determining whether due process rights should attach.[36]

Another problem has been that in custody decisions the affected rights of the child have not always been apparent.[37] The starting point has often been to determine which of the competing parties has superior rights to the child.[38] Although the child's interests are said to be protected by the court, it has also been said that he is more in the position of a chattel than an individual with identifiable interests apart from those vying for his custody.[39] In other words, custody questions have been considered primarily to involve the rights of the parents to the custody of the child.[40]

This attitude has received a great deal of criticism.[41] As the dissent in *Brown v. Chastain*[42] pointed out, the effects of custody decisions have an impact upon the child for his entire life, and at least some guarantees that his interests are represented and protected should arise in these proceedings.[43] *Gault* held that due pro-

---

33. *See generally*, Powell v. Alabama, 287 U.S. 45 (1932).

34. Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229, 234 (1970).

35. *Id.*

36. *Id. See also*, Hannah v. Larche, 363 U.S. 420, 442 (1960). This case is not concerned with child custody; however, it points out that the nature of the rights involved and of the proceeding, as well as the burden that requiring due process would place on the proceeding, should be the consideration in determining whether due process rights attach.

37. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 54 (1973).

38. May v. Anderson, 345 U.S. 528, 534 (1953).

39. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 54 (1973).

40. *Id.*

41. *Id.*

42. 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970).

43. In discussing the gravity of the issues involved, Justice Rives stated:

The formation of a young girl's life habits are at stake. The makeup of her personal-

cess was the "primary and indispensible foundation" for assuring that each person's rights were protected.[44] If *Gault* could be interpreted to encompass those situations that affect substantial or fundamental interests, then it would seemingly be applicable in custody questions, because of the nature of the interests involved.

Wisconsin is a leading state in providing, through case law, representation for children in custody proceedings.[45] Several decisions in that state have held that the child's interests in such matters are important, distinct, and worthy of protection. Beginning with *Edwards v. Edwards,*[46] the Wisconsin Supreme Court moved beyond merely determining who of the competing parties was "fit" to obtain custody. The court instead took a broader look at all the circumstances in order to determine which of the homes in question would provide the child with security, a relationship with his siblings, and a sense of family.[47] Later, in *Wendland v. Wendland,*[48] it was held that a guardian ad litem should be appointed to represent the child in "hotly contested" custody decisions.[49] Finally, in *Dees v. Dees,*[50] the Wisconsin Supreme Court remanded the case to the trial court with specific instructions to appoint a guardian ad litem for the child so that there would be sufficient information presented to the trial court regarding the child's interests.[51]

Other states have also begun to address the question. Alaska and Missouri have statutes that specifically provide for the appointment of guardians ad litem.[52] Rhode Island and Ohio courts have

---

> ity will be determined for all time during the next few years. A well-founded parental relationship for this girl is a necessity . . . . Dawn Elaine's right to a just determination of her best interests is fully as important as a person's right to be free from incarceration by the State.
>
> . . . While I am fully cognizant of the gravity of a juvenile's being declared delinquent, I feel that the important liberties at stake in this case require the same degree of judicial vigilance. A change of parental bondage during the tender years is hardly less upsetting of one's pattern of life than is the denomination and possible commitment of a child as a "juvenile delinquent."

Brown v. Chastain, 416 F.2d 1012, 1027 (5th Cir. 1969) (Rives, J., dissenting).

44. 387 U.S. 1, 20 (1967).

45. Foster & Freed, *A Bill of Rights for Children,* 6 A.B.A. FAM. L.Q. 343, 355-56 (1972).

46. 270 Wis. 48, 70 N.W.2d 22 (1955).

47. *Id.* at 56, 70 N.W.2d at 26.

48. 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

49. *Id.* at 156, 138 N.W.2d at 191.

50. 41 Wis. 2d 435, 164 N.W.2d 282 (1969).

51. *Id.* at 444, 164 N.W.2d at 287.

52. ALASKA STAT. § 47.10050 (1979) states as follows: "(a) Whenever in the course of proceedings instituted under this chapter it appears to the court that the welfare of the minor

held that the power to appoint a guardian ad litem is inherent in the power of the family courts.[53] The Nebraska court has remanded a custody question in a divorce and ordered appointment of counsel for the children, holding that Nebraska statutes allowed such appointments.[54] In Alabama, a 1975 decision held that a child's due process rights were not involved in custody proceedings;[55] however, a later federal district court holding in a similar case may suggest a modification in future state court decisions, as it was held by the district court that a child must be represented by counsel in a dependency and neglect hearing.[56]

The children in *Ricketts v. Ricketts*[57] based their argument squarely on the issue of due process rights. They argued that they had a right to be notified, heard, and represented by counsel in the determination of their custody. They based their argument on the *Gault* requirement of counsel and on *Roe v. Conn,*[58] which held that a child has a right to his own counsel in custody proceedings.[59] They

---

will be promoted by the appointment of an attorney to represent the minor or other person to serve as a guardian ad litem, the court may make the appointment."

MO. ANN. STAT. § 453.020 (1969) states as follows: "The court shall, in all cases where the person sought to be adopted is under the age of twenty-one years, appoint a guardian ad litem to represent in said proceedings the person sought to be adopted. . . ."

53. Zinni v. Zinni, 103 R.I. 417, 238 A.2d 373 (1968): "It is well settled that whenever in any judicial proceeding it shall be made to appear that there are interests of a minor to be protected, the judicial officer presiding has the inherent power to appoint a guardian ad litem for the protection of the minor's interests." *Id.* at 421, 238 A.2d at 376; Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866 (1967):

> The examination of the investigation of this cause, together with the charges and counter-charges expressed by the pleadings and at the hearing in open court, satisfy this Court that this is one of those cases where the children need protection other than that which can be otherwise given by either or both of the parents. It is for precisely this purpose that the Guardian Ad Litem was conceived and is to be executed.

Id. at 142, 225 N.E.2d at 867.

54. Pieck v. Pieck, 190 Neb. 419, 209 N.W.2d 191 (1973). In this case, the father had based his appeal in part on the argument that the failure of the trial court to appoint counsel for the children was not in their best interests. *Id.* at 420, 209 N.W.2d at 192.

55. Leigh v. Aiken, 54 Ala. App. 620, 311 So. 2d 444 (1975).

56. Roe v. Conn, 417 F. Supp. 769 (N.D. Ala. 1976). This case is perhaps distinguishable from Leigh v. Aiken, *supra* note 55, basically on the fact that *Leigh* was a divorce-custody and *Roe* was a dependency-neglect case that involved the termination of parental rights. *Roe* at least refines *Leigh* to the extent that it finds that the child does have some interest apart from that of the parents.

57. 265 Ark. 28, 576 S.W.2d 932 (1979).

58. 417 F. Supp. 769 (N.D. Ala. 1976).

59. *Roe v. Conn* involved the emergency removal of a child from the custody of his mother. Alabama law provided that a child less than sixteen years old could be removed from his parents under emergency circumstances without a hearing. The state had argued that the

also contended that the Arkansas statutory requirements for notice were not followed.[60] The Arkansas Supreme Court did not address the children's contentions but rather stated that it would reverse and remand with an opportunity to obtain counsel "in view of the

---

circumstances that the child was "dirty and that his white mother was living with a black man" amounted to an emergency. The court held that only in a situation that amounted to an immediate threat of danger could there be an emergency. Here there was not such a threat, and a hearing could have been held. The court held that in these hearings the child should be represented by counsel because family integrity is a fundamental right. The interests of the parties are not necessarily the interests of the child, and therefore he has a right to representation. *Id.* at 780.

60. ARK. STAT. ANN. §45-423, -425 (Cum. Supp. 1979). The pertinent portions are as follows:

> 45-423. Contents of petition.—Any adult may file with the Clerk of the Juvenile Court having jurisdiction over the matter, a petition in writing setting forth the facts concerning a juvenile which, if true, would render such juvenile defendant delinquent, in need of supervision, or dependent-neglected within the meaning of this Act [§§ 45-401—45-449]. *The petition shall also set forth any Section(s) of the criminal laws of this State which the juvenile would be guilty of violating if the facts alleged in the petition were found to be true.* The petition shall also set forth either the name, or that the name is unknown to the petitioner, of the following persons: (a) the person(s) having custody of the juvenile; (b) each of the parents, or the surviving parent of the juvenile; and (c) the guardian of the juvenile. All persons names [named] in such petition shall be made defendants by name and receive notice as provided by this Act. *All persons whose names are stated by the petitioner to be unknown shall be made defendants by the designation "all whom it may concern" and shall be sufficient to authorize the Court to hear and determine the cause as though the parties had been sued by their proper names.*

(Italics added).

> 45-425. Notification of defendants.—All defendants who are residents of this State, unless this Act [§§ 45-401—45-449] otherwise provided, shall be notified by summons in the same manner as the laws of this State now or may hereafter require in Chancery proceedings. All defendants who are nonresidents of this State and whose address is known, or upon due inquiry can be determined, and all residents of this State who have left this State, but where address in the State to which they have moved is known or upon due inquiry can be determined, shall be notified by registered or certified mail. *All juvenile defendants shall be notified by delivering a copy of the petition and the summons to the juvenile and to the person having care and control of the juvenile.*

(Italics added).

ARK. STAT. ANN. §§ 45-427, -428 (1977). The pertinent portions are as follows:

> 45-427. Contents of summons.—The summons shall require the person alleged to have custody of the juvenile to appear with the juvenile and shall also direct the juvenile to appear at the time and place stated in the summons.
>
> 45-428. Commencement of adjudication.—In case of dependency-neglect, the court may proceed to hear evidence upon appearance, answer, or default of all defendants to the proceeding. In cases of delinquency or juvenile in need of supervision, the court may proceed to hear evidence after the juvenile has been formally charged, advised of his rights, and upon his appearance in court. If the juvenile is not accompanied by his parent or guardian, the court may appoint some suitable person as guardian ad litem to act on behalf of the juvenile. At any time after the filing

ages of the children and their affidavits. . . ."[61] In this manner, the court found, the constitutional requirements asserted by the children would be met.[62] Rather than adopt a strict due process stance, the court apparently chose to adopt a guardian ad litem approach to this particular case, one that would insure representation of the children's interests. It stopped short of requiring independent counsel in every case.

In support of its holding, the court cited *State ex rel. Juvenile Department of Multnomah County v. Wade,*[63] in which a decision terminating the custody of the natural parents was reversed and remanded with an order that counsel be appointed to represent the children. The reasoning in that case suggested that neither party—the parents nor the state social services department—could adequately represent the interests of the children.[64] The Arkansas Supreme Court also cited the Uniform Juvenile Court Act.[65] This Act provides for the appointment of a guardian ad litem in all matters affecting custody.[66] Finally, the court cited *Vilas v. Vilas,*[67] which held that a chancellor could take into consideration the preferences of the child in making custody decisions.[68] The language used by the court in *Ricketts,* however, does not appear to require counsel or the presence of the children.[69]

Ricketts presented the Arkansas Supreme Court with its first

---

of the petition and pending the final disposition of the case, the court may continue the hearing and may allow the juvenile to remain in his home in the custody of his parent(s), guardian, or custodian, subject to visitation by a probation officer, or to be kept in some suitable foster home, shelter care facility, or detention facility.

(Italicized portions were added in the 1979 legislative session and were not part of the Code at the time of the litigation in this case.)

61. Ricketts v. Ricketts, 265 Ark. 28, 31, 576 S.W. 2d 932, 933 (1979). The court was particularly concerned with the children's affidavits. It considered the allegations of abuse and neglect to be important issues that should have been brought before the circuit court and concluded that they should be dealt with before a final custody decision could be made. *Id.*

62. *Id.*

63. 527 P.2d 753 (Or. App. 1974).

64. *Id.* at 756-57.

65. 9A U.L.A. UNIFORM JUVENILE COURT ACT (1968).

66. The Act states: "[A] party is entitled to representation by legal counsel at all stages of any proceeding under this Act." *Id.* at § 26(a).

67. 184 Ark. 352, 42 S.W.2d 379 (1931).

68. *Id.* at 359, 42 S.W.2d at 381-82.

69. Ricketts v. Ricketts, 265 Ark. 28, 576 S.W.2d 932 (1979). The court merely stated: "[W]e hold that the judgment should be reversed and the cause remanded in order to accord them *an opportunity* to be present and heard with counsel upon their intervention. By this procedure, all constitutional requirements as asserted by appellants will be fully met." (emphasis added). *Id.* at 31, 576 S.W.2d at 933.

opportunity to consider the issue of children's due process rights in custody cases.[70] Despite the lack of case law, there is statutory authority in Arkansas that provides a vehicle for insuring due process rights for children. The Juvenile Code contains specific provisions for notice and opportunity for hearing,[71] and allows for the appointment of counsel for the child.[72] There is also a provision in the Child Abuse and Neglect Reporting Act[73] that requires appointment of a guardian ad litem in all cases arising under the Act.

A major problem with the representation provisions of the statutes is that they appear in statutes dealing with several different types of juvenile questions.[74] The same requirements seem to apply to juvenile delinquency, status offense, and child abuse and neglect questions. Apparently, the legislative intent was to comply with the *Gault* requirements in juvenile delinquency proceedings, because of the specific requirements of the statutes in those cases,[75] and also to leave a gray area with regard to dependency and neglect cases so that they may be handled on a case-by-case basis.[76]

The Arkansas Supreme Court had the opportunity, but did not act on it, to make a definitive statement concerning the rights of children in custody proceedings, at least in those arising from dependency and neglect actions, and to clarify the statutory ambiguities in the Juvenile Code and the Child Abuse and Neglect Report-

---

70. A significant case in this context is Kirk v. Jones, 178 Ark. 583, 12 S.W.2d 879 (1928), wherein the court stated: "[I]t is the duty of [the Chancery Courts] to make any orders that would properly safeguard [children's] rights." *Id.* at 586, 12 S.W.2d at 880.

71. ARK. STAT. ANN. § 45-425 (Cum. Supp. 1979).

72. ARK. STAT. ANN. § 45-428 (1977).

73. ARK. STAT. ANN. § 42-817 (1977). The pertinent portion is as follows:

> (a) The Court, in every case filed under this Act [§§ 42-807—42-818], shall appoint a guardian ad litem for the child . . . . The guardian ad litem shall, in general, be charged with the representation of the child's best interests. To that end, he shall make further investigation that he deems necessary to ascertain the facts, to interview witnesses, examine and cross-examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court and participate further in the proceedings to the degree appropriate for adequately representing the child.

74. ARK. STAT. ANN. § 45-406 (1977) states as follows: "The juvenile courts of the several counties shall have original and exclusive jurisdiction in all cases of delinquency, juveniles in need of supervision and dependency-neglect arising under this Act."

75. In particular the Code sets out requirements for giving notice and for advising the juvenile of his rights in ARK. STAT. ANN. § 45-426 (1977) and for providing counsel in ARK. STAT. ANN. § 45-428 (1977).

76. It is unclear from the wording of ARK. STAT. ANN. § 45-428 (1977) whether the statute contemplates appointment of a guardian ad litem in cases of dependency and neglect, or whether the portion of that statute dealing with the appointment of a guardian ad litem merely refers to juvenile delinquency adjudications.

ing Act. Instead, it limited its decision to the specific problems of the *Ricketts* case and only hinted at what might be required to protect the interests of children in the courts of this state.

Deborah R. Sallings